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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

RAY ANTHONY McNUTT,

Defendant and Appellant.

B200032

(Los Angeles County
Super. Ct. No. TA088118)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary E. Daigh, Judge. Affirmed.

Rebecca F. Thornton, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec, Robert S. Henry and Peggy Z. Huang Deputy Attorneys General, for Plaintiff and Respondent.

Ray Anthony McNutt appeals from his conviction of possession of a controlled substance, cocaine base, in violation of Health and Safety Code section 11350, subdivision (a). He raises three issues on appeal. First, he contends the evidence is insufficient to support the verdict. Next, he asks that we review the sealed *Pitchess*¹ record to determine whether discoverable information was improperly withheld, and also asks that we review the trial court's denial of his second, mid-trial *Pitchess* motion. Finally, he contends that the trial court abused its discretion at sentencing when it denied his request to dismiss a prior strike in the interests of justice. For the reasons stated in this opinion, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On December 14, 2006, at approximately 2:00 a.m., Officer Manuel Castaneda of the Los Angeles Police Department was on patrol in a black and white police car with his partner, Officer Rene Silva. Castaneda noticed a black Ford Thunderbird parked in a commercial area known for narcotics activity. There appeared to be a person in the driver's seat and a person in the passenger's seat. Castaneda stopped his vehicle in the middle of the street, about 25 feet behind the Thunderbird, and approached the driver's side of the parked car. When he was about 10 feet away, Castaneda saw the person in the driver's seat lean to the left and extend his right arm behind the passenger's seat.

When Castaneda got to the car, he saw appellant in the driver's seat and asked appellant what he was doing. Appellant replied that he wanted to be honest and he had "smoked rock." Castaneda ordered appellant and the passenger, Pamela Manuel, out of the car and asked if there were narcotics in the vehicle. Appellant answered, "No, go ahead and check." Castaneda and Silva ordered appellant and Manuel to face away from the vehicle; Silva supervised them while Castaneda searched the Thunderbird. Castaneda checked the floor behind the passenger's seat, where he saw a substance he recognized as rock cocaine. The parties stipulated at trial that the substance had been analyzed and

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

found to be .48 grams net weight of cocaine base. The rest of the vehicle search turned up only beer cans, which apparently belonged to Manuel. Castaneda placed appellant under arrest for possession of rock cocaine. Manuel was not placed under arrest and was permitted to leave. When Castaneda performed a search of appellant incident to arrest, he found a shattered glass smoking device in appellant's sock. Castaneda believed the smoking device was used for smoking rock cocaine.

During booking, appellant stated he had been clean for a number of years, but had recently relapsed, and had been smoking rock cocaine for a number of days straight. Castaneda, who was present during booking, opined that appellant appeared to be coming off of the influence of rock cocaine, as indicated by appellant's difficulty staying awake and paying attention. No tests were performed to determine whether appellant was, in fact, under the influence of any controlled substance.

Appellant was charged with one count of possession of a controlled substance. (Health and Saf. Code, § 11350, subd. (a).) Accompanying count one were allegations that appellant had suffered a prior conviction of a serious or violent felony within the meaning of the "Three Strikes" law (Pen. Code, §§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i)), and that appellant served separate prison terms for six prior convictions (Pen. Code, § 667.5, subd. (b)). Appellant pled not guilty. A jury found him guilty of the count charged. The trial court found the prior conviction of a serious or violent felony and five of the six prior prison term allegations to be true. Appellant was sentenced to prison for the high term of three years, doubled to six years by reason of the Three Strikes law, to which two one-year enhancements were added for prior prison terms, amounting to a sentence of eight years. Appellant timely appeals from the judgment of conviction.

DISCUSSION

I

Appellant contends there is insufficient evidence to support his conviction for possession of a controlled substance. "It is the prosecution's burden in a criminal case to prove every element of a crime beyond a reasonable doubt. [Citation.] To determine

whether the prosecution has introduced sufficient evidence to meet this burden, courts apply the ‘substantial evidence’ test. Under this standard, the court ‘must review the whole record in the light most favorable to the judgment below to determine whether it discloses *substantial evidence*—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’” (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.) “[E]vidence which merely raises a strong suspicion of the defendant’s guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact.” (*People v. Thompson* (1980) 27 Cal.3d 303, 324, overruled on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260.)

The essential elements the prosecution must prove to sustain a conviction for possession of a controlled substance are “‘dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character.’” (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.) Each of the elements may be established with circumstantial evidence. (*Ibid.*) Appellant challenges the sufficiency of the evidence to support the jury’s implied findings that he had dominion and control of the controlled substance and that he had knowledge of the presence of the controlled substance. Though dominion and control of the substance and knowledge of its presence are two separate elements, they were established by the same evidence in this case. For that reason, we discuss them together.

“‘Mere proof of opportunity of access to a place where narcotics are found will not support a finding of unlaw[f]ul possession.’” (*People v. Tripp* (2007) 151 Cal.App.4th 951, 956.) Dominion and control over the location where the substance is found strengthens the inference of dominion and control over and knowledge of the narcotic substance. (*People v. Williams* (1971) 5 Cal.3d 211, 215.) Thus, dominion and control over a vehicle, though not dispositive, supports an inference of possession of narcotics found in that vehicle. (*Ibid.*) Dominion and control need not be exercised by the appellant alone; possession may be exclusive or joint. (*Ibid.*) “When the contraband is found in a place to which a defendant and others have access and over which none has

exclusive control ‘no sharp line can be drawn to distinguish the congeries of facts which will and that which will not constitute sufficient evidence of a defendant’s knowledge of the presence of a narcotic.’” (*People v. Tripp, supra*, 151 Cal.App.4th at pp. 956-957.)

Appellant tries to downplay the extent of his dominion and control over the vehicle itself, pointing out that he borrowed the car from his fiancé, Mary Goins, and that she sometimes loaned the car to others. Appellant cites a series of cases in which mere presence as a guest at a location where narcotics were found did not constitute substantial evidence of dominion and control over the drugs. (See *People v. Johnson* (1984) 158 Cal.App.3d 850; *People v. Jenkins* (1979) 91 Cal.App.3d 579; *People v. Stanford* (1959) 176 Cal.App.2d 388; *People v. Tabizon* (1958) 166 Cal.App.2d 271; *People v. Hancock* (1957) 156 Cal.App.2d 305.) He argues that, as in the cited cases, mere suspicion supports the inferential bridge from his presence in the vehicle to his dominion and control over, and knowledge of, the cocaine base found on the floorboard behind the passenger’s seat. The cases cited by appellant are distinguishable. Appellant’s conviction was not based on mere suspicion arising from his presence as a guest at a location where drugs were accessible. Additional evidence was presented from which a reasonable trier of fact could have inferred appellant’s knowledge and control of the cocaine base.

The prosecution presented evidence that Castaneda saw appellant reaching his arm behind the passenger’s seat, toward where the cocaine base was found, as the police approached the vehicle. Suspicious or furtive movements as the police approach may indicate “guilty knowledge.” Taken alone, such evidence is insubstantial, but it may support an inference of knowing possession when considered along with access to or the presence of a controlled substance. (See *People v. Evans* (1973) 34 Cal.App.3d 175, 178 [passenger facing rear of van where marijuana was located and “moving about” as police approached]; *People v. Hokuf* (1966) 245 Cal.App.2d 394, 397-398 [driver reaching down toward floorboard as police approach; marijuana cigarette found under carpet]; *People v. Roberts* (1964) 228 Cal.App.2d 722, 725 [“great deal of commotion” inside vehicle after police began following; drugs found on front seat].) At trial, appellant

questioned the credibility of Castaneda's testimony, given that the incident took place at night in a poorly lit area. The jury apparently believed Castaneda's testimony was credible, and we will not re-evaluate that determination. "[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

Appellant's statement that he had "smoked rock" is another piece of evidence that would not sustain a conviction for possession of a controlled substance by itself, but may support an inference of knowing possession when considered along with appellant's suspicious movements, the smoking device found in appellant's sock and the presence of the cocaine base in the vehicle. (See *People v. Roberts, supra*, 228 Cal.App.2d at p. 728.) Circumstances which are, by themselves, insufficient evidence of knowledge or dominion and control may add up to sufficient evidence when taken together. (*Ibid.*)

Manuel's testimony at trial that the cocaine base belonged to her, and that appellant did not know it was in the car, does not require a different result. At no time before the trial had Manuel claimed the drugs were hers, despite the opportunity to do so. Additionally, her testimony was contradicted on a number of points by the testimony of Castaneda and Silva. The weight given to her testimony was a question for the jury, and a reasonable juror could have discredited her last-minute confession.

The evidence supporting appellant's conviction is not overwhelming, but it is substantial. "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]' [Citation.] Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358.)

There is sufficient evidence to support appellant's conviction.

II

Before trial, appellant filed a *Pitchess* motion seeking discovery of complaints against Officers Castaneda and Silva that involved allegations of dishonesty and fabrication of evidence. In response to this request, the trial court ordered that information about one complaint against Silva be turned over to the defense; no information about Castaneda was found to be discoverable.

Appellant makes two requests on appeal in relation to his *Pitchess* motion. First, he asks this court to review the sealed records from the in camera hearing to determine whether any additional discoverable information was improperly withheld from appellant. Second, he asserts that the trial court erred in denying the “renewed *Pitchess* motion” he made upon learning that Silva would be called as a trial witness by the prosecution. Because the second request seems to arise from a misunderstanding of what took place in the trial court—a misunderstanding shared by respondent—we address that request first.

Appellant states that his original *Pitchess* motion was granted as to Castaneda, but not as to Silva. Citing to statements in the record by appellant’s trial counsel, appellant attributes this decision by the trial court to the fact that, at the time the motion was made, Castaneda was expected to testify but Silva was not.

Appellant submitted a written *Pitchess* motion to the trial court. No copy of the written motion or the written opposition appears in the record. On March 13, 2007, at a hearing attended by the prosecutor, defense counsel and Allen Struler, attorney for the Los Angeles Police Department (LAPD), the trial court stated it had reviewed the moving papers and asked if either side wished to be heard further. Neither party offered oral argument, so the court announced that it had reached a tentative decision to grant the motion. The following exchange then occurred:

“MR. STRULER: As to which officer?

“THE COURT: You know, I was looking through the report and it has both their names on it, and it’s raised a question so I really can’t differentiate. I think I am going to have them both.

“MR. STRULER: As to what specific allegations?

“THE COURT: Just as to dishonesty, fabrication of evidence, that sort of thing.”

An in camera hearing was held immediately to determine which, if any, records were discoverable. This hearing was attended only by Struler and Thomas Breckner, custodian of records for the LAPD.² During the in camera hearing, the custodian of records stated under oath that he brought to the hearing all of the complaints filed against Castaneda and Silva within the relevant five-year period, not just those responsive to the request. The court asked the custodian to state on the record the topic of each complaint. The court also personally looked at each complaint. Upon examining each complaint individually, the court determined that none were responsive to the *Pitchess* motion as to Castaneda, but one was responsive as to Silva. The trial court did not apply different standards based on who was expected to testify when reviewing the officers’ respective files. Back in open court, the trial court stated that some materials were discoverable and would be turned over to the defense. When announcing the ruling, the court did not specify to which officer the discoverable materials pertained. There is no indication that the LAPD failed to comply with the court’s ruling.

The issue next arose during the trial, before a different judge. When defense counsel learned the prosecution was calling Silva to testify, she made another *Pitchess* motion as to Silva, saying, “[W]e had a *Pitches[s]* that was heard in Department L, and that *Pitches[s]* was only granted as to Officer Castaneda. It was not granted as to Officer Silva because we did not have a police report or any other statements.” Defense counsel did not state the basis for her belief that the motion had been denied as to Silva, or the basis for her belief that the reason for the denial was the expectation that Silva would not testify. It is clear from the record of the original *Pitchess* motion that defense counsel was mistaken, since the court directed that material be turned over as to Silva, not

² In his brief, respondent insists that the defendant, defense counsel and the district attorney were present in the in camera hearing, but the record does not bear this out.

Castaneda. The trial judge, not having been present at the *Pitchess* hearing, did not correct defense counsel, but denied her motion as untimely.

On the basis of this record, we conclude the trial court did not err when it denied appellant's "renewed" *Pitchess* motion. The motion appears to have been based on defense counsel's misunderstanding of the court's ruling on her first motion. The *Pitchess* motion with regard to Silva already had been granted. There was no basis for a second review of materials pertaining to Silva. In light of this conclusion, the arguments made on appeal by both parties are moot, because they assume the *Pitchess* motion was not granted with respect to Silva.

Turning to appellant's other request, we have reviewed the sealed transcript of the in camera hearing. Appellant is entitled to appellate review of either the personnel records reviewed by the trial court or a transcript of the in camera hearing in which the records were reviewed. (See, e.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1285.) We review the trial court's decision regarding the discoverability of material in police personnel files under the abuse of discretion standard. (*People v. Cruz* (2008) 44 Cal.4th 636, 670.)

Though the documents screened by the trial court were not made part of the record on appeal, the reporter's transcript is adequate to permit meaningful appellate review. The court or the custodian of records stated for the record the contents of each document. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1229.) Additionally, the court, rather than the custodian of records, determined which documents in the personnel file contained relevant information. (Cf. *People v. Wycoff* (2008) 164 Cal.App.4th 410, 415 [insufficient record when custodian did not produce entire personnel file and no record was made of personnel documents not produced]; *People v. Guevara* (2007) 148 Cal.App.4th 62, 68 [same].)

Having reviewed the sealed reporter's transcript of the in camera proceeding, we conclude the trial court did not abuse its discretion in determining which material was discoverable.

III

Appellant contends that the trial court abused its discretion when it denied his motion to dismiss his prior felony conviction. Penal Code section 1385 gives a trial court discretion to dismiss prior felony conviction allegations “in the furtherance of justice” in cases brought under the Three Strikes law.³ (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.)

We review the trial court’s decision not to dismiss a prior strike for abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th at p. 371.) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) Our Supreme Court has provided the following standard to guide the lower courts’ exercise of discretion: “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Appellant’s prior serious or violent felony conviction was his 1989 conviction for attempted murder (Pen. Code, §§ 664 & 187). The trial court acknowledged that the strike conviction was old and that the current conviction was not for a serious or violent felony. The court also considered the mitigating factors presented by appellant, such as his ties to the community, his mental illness and his history of drug abuse and addiction

³ Though common, it is technically inaccurate to speak of a *Romero* “motion.” “A defendant has no right to make a motion, and the trial court has no obligation to make a ruling, under section 1385.” (*People v. Carmony* (2004) 33 Cal.4th 367, 375; Pen. Code, § 1385, subd. (a).) Instead, a defendant may ask the trial court to exercise its discretion under Penal Code section 1358. (*People v. Carmony, supra*, 33 Cal.4th at p. 375.)

dating back to his childhood. The trial court considered these factors to be outweighed by the very serious nature of the first strike, appellant's poor past performance on probation and parole, and his extensive record of convictions and prison time. With regard to appellant's criminal history, the trial court stated, "I have not seen anybody with as much continuous time in prison and violating parole and everything else, so that would dictate not to strike it." In addition to the strike conviction for attempted murder, appellant had at least three prior convictions for possession of a controlled substance (Health & Saf. Code, § 11350) and one for sale of marijuana (Health & Saf. Code, § 11359).

Appellant argues that he is outside the spirit of the Three Strikes law because his recent history is nonviolent, and he is therefore unlikely to present a danger to others. He further argues that his history of drug-related offenses results from his mental illness and drug addiction. He also points out that he went almost long enough without a non-drug-related prior to be eligible for treatment under Proposition 36. (Pen. Code, §1210.1.) All of these considerations were before the trial court when it decided not to strike appellant's prior conviction. It was not irrational or arbitrary for the trial court to consider these factors and yet decide that appellant fell within the spirit of the Three Strikes law. "[A] 'decision will not be reversed merely because reasonable people might disagree.'" (*People v. Carmony, supra*, 33 Cal.4th at p. 377.)

Only in exceptional cases will the trial court abuse its discretion by failing to strike a prior felony conviction. (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) These circumstances might exist if the trial court was unaware it had discretion to dismiss, or if the court considered impermissible factors in reaching its decision. (*Ibid.*) In this case, the trial court was aware of its discretion; it explicitly considered the appropriate factors to determine whether it was in the interests of justice to exercise its discretion by dismissing appellant's prior felony convictions.

The trial court did not abuse its discretion in denying appellant's request to dismiss his prior strike.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.